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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 ROBERT MALLORY, KAREN MALLORY  
8 and ALAN WILLEY, on behalf of themselves  
and all others similarly situated,

9 Plaintiffs,

10 v.

11 MCCARTHY & HOLTHUS, LLP,

12 Defendant,

Case No. 2:14-CV-00396-KJD-VCF

**ORDER**

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14 Before the Court is Defendant McCarthy & Holthus, LLP's Motion to Dismiss (#13)  
15 Plaintiffs' first amended complaint. Plaintiffs Robert Mallory, Karen Mallory, and Alan Willey  
16 filed a response in opposition (#17) to which Defendant replied (#18).

17 I. Background

18 Plaintiffs Robert Mallory and Karen Mallory ("the Mallorys") are Clark County residents  
19 who obtained a mortgage loan to purchase a home in Las Vegas (#12, p. 5). Plaintiff Alan Willey  
20 ("Willey") is a Clark County resident who obtained a mortgage loan to purchase a home in  
21 Henderson. Id. at 10. In 2013, Defendant, a multi-state law firm, sent a letter to the Mallorys and  
22 a letter to Willey (#13, p. 4). The letters, which are nearly identical, stated that Plaintiffs'  
23 mortgage payments were past due and their properties had been referred to foreclosure (#14, Ex.  
24 1, 2). Both letters indicated that Plaintiffs could avoid foreclosure by making their accounts  
25 current, obtaining a loan modification, or selling their properties through an approved short sale.  
26 Id. Each letter detailed Plaintiffs' account information, including: the total amount needed to

1 reinstate and avoid foreclosure, the amount in default, the current unpaid principal obligation  
2 under the mortgage, the amount of interest accrued, the amount of accrued late charges, and the  
3 estimate of fees imposed in connection with the power of sale. Id.

4 Several months later, Plaintiffs filed a complaint (#1) and a first amended complaint  
5 (#12) asserting that Defendant violated the Fair Debt Collection Practices Act (“FDCPA”) and  
6 the Nevada Deceptive Trade Practices Act (“NDTPA”) when it sent letters that, Plaintiffs  
7 alleged, were not in compliance with the FDCPA. Defendant filed the present motion to dismiss  
8 pursuant to FED. R. CIV. P. 12(b)(6).

## 9 II. Legal Standard

10 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken  
11 as true and construed in a light most favorable to the non-moving party.” Wyler Summit  
12 Partnership v. Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation  
13 omitted). Consequently, there is a strong presumption against dismissing an action for failure to  
14 state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation  
15 omitted).

16 To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
17 accepted as true, to state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 129 S.  
18 Ct. 1937, 1949 (2009). Plausibility, in the context of a motion to dismiss, means that a plaintiff  
19 has pleaded facts which allow the court to draw the reasonable inference that the defendant is  
20 liable for the misconduct alleged. Id.

21 The Iqbal evaluation illustrates a two prong analysis. First, a court identifies the  
22 allegations which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51.  
23 Second, a court determines if the remaining factual allegations plausibly suggest an entitlement  
24 to relief. Id. at 1951. If the allegations state plausible claims for relief, the claims survive the  
25 motion to dismiss. Id. at 1950.

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1 III. Analysis

2 Defendant contends that Plaintiffs' first amended complaint should be dismissed because  
 3 (1) Defendant did not engage in "debt collection," as defined by the FDCPA; (2) Defendant is  
 4 not a "debt collector," as defined by the FDCPA; (3) Plaintiffs' claim involving 15 U.S.C. §  
 5 1692f is deficient; and (4) Plaintiffs failed to properly plead an NDTPA claim.

6 A. The Fair Debt Collection Practices Act

7 Congress passed the FDCPA to eliminate abusive debt collection practices by debt  
 8 collectors, ensure that debt collectors who refrain from using abusive debt collection practices  
 9 are not competitively disadvantaged, and promote consistent State action to protect consumers  
 10 against debt collection abuses. 15 U.S.C. § 1692(e). To accomplish this, the FDCPA prohibits  
 11 several debt collection practices and allows individuals to sue offending debt collectors. See 15  
 12 U.S.C. §§ 1692a-p.

13 In their first amended complaint, Plaintiffs allege that Defendant violated three FDCPA  
 14 provisions. The first provision, 15 U.S.C. § 1692g(a), requires a debt collector to send a  
 15 consumer written notice within "five days after the initial communication with a consumer in  
 16 connection with the collection of any debt," and outlines the contents of that notice. The second  
 17 provision, 15 U.S.C. § 1692e, prohibits a debt collector from using "any false, deceptive, or  
 18 misleading representation or means in connection with the collection of any debt." The third  
 19 provision, 15 U.S.C. § 1692f, states that a "debt collector may not use unfair or unconscionable  
 20 means to collect or attempt to collect any debt."

21 Defendant first argues that it was not engaged in "debt collection," as defined under the  
 22 FDCPA. Thus, to survive Defendant's motion to dismiss under Rule 12(b)(6), Plaintiffs must  
 23 allege facts that allow the Court to reasonably infer that Defendant engaged in "debt collection."  
 24 See Iqbal, 129 S. Ct. at 1949. Plaintiffs allege that Defendant engaged in "debt collection" when  
 25 it sent its letters to Plaintiffs because the letters state that they are an attempt to collect debt (#12,

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1 pp. 5-7, 10-11). Plaintiffs support this allegation with specific language found within each  
 2 letter.<sup>12</sup> Id. These factual allegations must be construed in a light most favorable to Plaintiffs.  
 3 See Wyler 135 F.3d at 661. Viewed this way, they plausibly suggest that Defendant engaged in  
 4 “debt collection.”

5 Defendant next argues that it is not a “debt collector” under the FDCPA. The FDCPA  
 6 defines a “debt collector” as any person who (1) “uses any instrumentality of interstate  
 7 commerce or the mails in any business the principal purpose of which is the collection of any  
 8 debts,” or (2) “regularly collects or attempts to collect, directly or indirectly, debts owed or due  
 9 or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). The FDCPA also contains six  
 10 classes of people or organizations that are excluded from its definition of “debt collector.” 15  
 11 U.S.C.A. § 1692a(6)(A)-(F). Plaintiffs allege that Defendant regularly engages in debt collection  
 12 both for itself and on behalf of others (#12, pp. 4-5). This clearly falls under the FDCPA’s  
 13 definition of a “debt collector.” Defendant does not refute Plaintiffs’ assertion, nor does it claim  
 14 one of the exceptions outlined in the FDCPA. Thus, these factual allegations, when viewed in a  
 15 light most favorable to Plaintiffs, plausibly suggest that Defendant is a “debt collector.”

16 Defendant finally argues that Plaintiffs’ claim involving 15 U.S.C. § 1692f is deficient  
 17 because Plaintiffs fail to specify how Defendant’s conduct was unfair or unconscionable.  
 18 Although § 1692f outlines specific conduct that violates the FDCPA, it also prohibits unfair or  
 19 unconscionable collection means generally. See 15 U.S.C. § 1692f. Plaintiffs allege that  
 20 Defendant engaged in unfair or unconscionable collection means when it sent the letters to  
 21 collect on Plaintiffs’ debts, failed to include the federally required notices, failed to include the  
 22 required statutory language, failed to identify to whom the debt was owed, failed to notify

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 24 <sup>1</sup> The Mallory letter states, in part: “**NOTICE: THIS OFFICE MAY BE CONSIDERED A DEBT  
 COLLECTOR AND THIS MAY BE CONSIDERED AS AN ATTEMPT TO COLLECT A DEBT AND ANY  
 INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**” (#12, p. 7).

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 26 <sup>2</sup> The Willey letter states, in part: “**NOTICE: THIS MAY BE CONSIDERED AS AN ATTEMPT TO  
 COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**”  
 (#12, p. 11).

1 Plaintiffs’ of their legal rights to dispute, and failed to notify that the debt would be assumed  
 2 valid unless it was disputed (#12, pp. 7-9, 11-13). When viewed in a light most favorable to  
 3 Plaintiffs, these allegations state a plausible claim for relief.

4 B. Nevada Deceptive Trade Practices Act

5 Defendant contends that Plaintiffs failed to properly plead an NDTPA claim. The  
 6 NDTPA is codified as NRS 598.0903-598.9694. If a party is found to have engaged in a  
 7 “deceptive trade practice” under the NDTPA, it may be subject to civil liability under NRS  
 8 41.600, which allows victims of consumer fraud to sue for damages, equitable relief, and  
 9 attorney’s fees.

10 Plaintiffs assert that the NDTPA incorporates the FDCPA through NRS 598.0923(3).  
 11 Plaintiffs are incorrect. NRS 598.0923(3) states: “a person engages in a ‘deceptive trade practice’  
 12 when in the course of his or her business or occupation he or she knowingly violates a state or  
 13 federal statute or regulation relating to the sale or lease of goods or services.” Defendant’s debt  
 14 collection efforts, as outlined in Plaintiffs’ first amended complaint, are not a “sale or lease of  
 15 goods or services.” Defendant is not offering Plaintiffs any good or service; rather, it is  
 16 attempting to recover on Plaintiffs’ pre-existing debts. Thus, Plaintiffs’ allegations, even when  
 17 taken as true, do not establish that Defendant engaged in a “deceptive trade practice” under NRS  
 18 598.0923(3).

19 In their response, Plaintiffs contend that Defendant’s failure to include FDCPA notices in  
 20 its letters is a “deceptive trade practice” under NRS 598.0915(15). The Court disagrees. Under  
 21 NRS 598.0915(15), a person engages in a “deceptive trade practice” if, in the course of his or her  
 22 business or occupation, he or she knowingly makes any other false representation in a  
 23 transaction. In Nevada, the suppression or omission of a material fact is equivalent to a false  
 24 representation only when a party is bound in good faith to disclose that material fact. See Nelson  
 25 v. Heer, 163 P.3d 420, 426 (Nev. 2007). Plaintiffs do not identify how Defendant is bound, under  
 26 Nevada law, to disclose the information found in the FDCPA notices. Plaintiffs also do not

1 specify any affirmative misrepresentations Defendant made. Plaintiffs consequently fail to state a  
2 plausible NDTPA claim under NRS 598.0915(15).

3 Plaintiffs' first amended complaint does not state a plausible claim for relief under the  
4 NDTPA. However, the Court grants Plaintiffs leave to file a second amended complaint to  
5 correct these deficiencies within ten (10) days from the entry of this order.

6 C. Defendant's Other Arguments

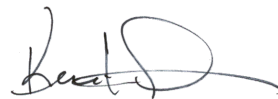
7 Defendant raises several other issues<sup>3</sup> which argue facts, rather than the sufficiency of the  
8 complaint. Although Defendant may choose to raise these arguments in a motion for summary  
9 judgment, the Court declines to convert the present motion into a motion for summary judgment.

10 IV. Conclusion

11 Accordingly, it is **HEREBY ORDERED** that Defendant's Motion to Dismiss (#13)  
12 Plaintiffs' First Amended Complaint is **DENIED IN PART** as to Plaintiffs' FDCPA claims, and  
13 **GRANTED IN PART** as to Plaintiffs' NDTPA claims;

14 **IT IS FURTHER ORDERED** that Plaintiffs Robert Mallory, Karen Mallory, and Alan  
15 Willey are granted leave to file a second amended complaint correcting the deficiencies of their  
16 NDTPA claim within ten (10) days of the entry of this order.

17 DATED this 11th day of May 2015.

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20 \_\_\_\_\_  
21 Kent J. Dawson  
22 United States District Judge  
23  
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26 <sup>3</sup> Defendant argues that its actions were foreclosure proceedings, which are not a "debt collection" under the FDCPA. Defendant also argues that it is not a "debt collector" under the FDCPA because it was merely enforcing a security interest in real property.